

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 28, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID HYUN-SU KIM,

Plaintiff,

v.

BOARD OF TRUSTEES OF
WHITMAN COLLEGE, doing
business as Whitman College,

Defendant.

No. 4:22-CV-5033-MKD

ORDER GRANTING STIPULATED
MOTION FOR PROTECTIVE ORDER
AND PROTECTIVE ORDER

ECF No. 10

Before the Court is the parties' Stipulated Motion for Protective Order. ECF No. 10. A district court may issue protective orders regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c); *Phillips ex rel. Ests. of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002).

The Court has reviewed the proposed protective order, the record, and is fully informed. Pursuant to Federal Rule of Civil Procedure 26(c), the Court finds good cause to issue the parties' stipulated protective order. ECF No. 10.

Accordingly, the parties shall abide by the protective order set forth below.

1 **PROTECTIVE ORDER**

2 **A. Purposes And Limitations**

3 Discovery in this action is likely to involve production of confidential,
4 proprietary, or private information for which special protection may be warranted.
5 Accordingly, the parties hereby stipulate to and petition the court to enter the
6 following Stipulated Protective Order. The parties acknowledge that this
7 agreement is consistent with Fed. R. Civ. P. 26(c). It does not confer blanket
8 protection on all disclosures or responses to discovery, the protection it affords
9 from public disclosure and use extends only to the limited information or items that
10 are entitled to confidential treatment under the applicable legal principles, and it
11 does not presumptively entitle parties to file confidential information under seal.

12 **B. “Confidential” Material**

13 “Confidential” material shall include the following documents and tangible
14 things produced or otherwise exchanged: “Confidential,” irrespective by whom
15 produced, including but not limited to any financial records, healthcare
16 information, sensitive personal information not subject to public disclosure, student
17 information (which may be produced in compliance with the Family Educational
18 Rights and Privacy Act (20 U.S.C. § 1232g), private personnel employment
19 information of employees or applicants’, payroll and salary information regardless
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1 of the form in which such records or information may be stored, including
2 aggregation of Confidential Information.

3 **C. Scope**

4 The protections conferred by this agreement cover not only confidential
5 material (as defined above), but also (1) any information copied or extracted from
6 confidential material; (2) all copies, excerpts, summaries, or compilations of
7 confidential material; and (3) any testimony, conversations, or presentations by
8 parties or their counsel that might reveal confidential material.

9 However, the protections conferred by this agreement do not cover information
10 that is in the public domain or becomes part of the public domain through trial or
11 otherwise.

12 **D. Access to and Use of Confidential Material**

13 *1. Basic Principles.*

14 A receiving party may use confidential material that is disclosed or produced
15 by another party or by a non-party in connection with this case only for
16 prosecuting, defending, or attempting to settle this litigation. Confidential material
17 may be disclosed only to the categories of persons and under the conditions
18 described in this agreement. Confidential material must be stored and maintained
19 by a receiving party at a location and in a secure manner that ensures that access is
20 limited to the persons authorized under this agreement.

1 2. *Disclosure of “Confidential” Information or Items*

2 Unless otherwise ordered by the court or permitted in writing by the
3 designating party, a receiving party may disclose any confidential material only to:

- 4 a. The receiving party’s counsel of record in this action, as well as
5 employees of counsel to whom it is reasonably necessary to
6 disclose the information for this litigation;
- 7 b. The Plaintiff, the officers, directors, and employees of the
8 receiving party to whom disclosure is reasonably necessary for this
9 litigation, unless the parties agree that a particular document or
10 material produced is for Attorney’s Eyes Only and is so
11 designated;
- 12 c. Experts and consultants to whom disclosure is reasonably
13 necessary for this litigation and who have signed the
14 “Acknowledgment and Agreement to Be Bound” (Exhibit A);
- 15 d. The Court, court personnel, and court reporters and their staff;
- 16 e. Copy or imaging services retained by counsel to assist in the
17 duplication of confidential material, provided that counsel for the
18 party retaining the copy or imaging service instructs the service not
19 to disclose any confidential material to third parties and to
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1 immediately return all originals and copies of any confidential
2 material;

3 f. During their depositions, witnesses in the action to whom
4 disclosure is reasonably necessary and who have signed the
5 “Acknowledgment and Agreement to Be Bound” (Exhibit A),
6 unless otherwise agreed by the designating party or ordered by the
7 court. Pages of transcribed deposition testimony or exhibits to
8 depositions that reveal confidential material must be separately
9 bound by the court reporter and may not be disclosed to anyone
10 except as permitted under this agreement;

11 g. The author or recipient of a document containing the information
12 or a custodian or other person who otherwise possessed or knew
13 the information;

14 h. Focus groups, provided that all information identifying any party
15 or potential witness is redacted from the materials presented, and
16 provided that reasonable measures are taken to protect against the
17 potential intentional or inadvertent retention or disclosure of any
18 Confidential Information by a focus group participant, for example
19 by limiting the method of electronic transmission of any
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1 Confidential Information to any focus groups to a secure screen-
2 share method.

3 No Confidential Information may be disclosed, either directly or indirectly,
4 except by prior written approval of the Parties or pursuant to an Order of the Court,
5 except to the persons specified above in 4(a) to 4(h). Nothing in this Order shall be
6 deemed to restrict in any manner the use by a Party of its own documents,
7 information, or material or information obtained independent of formal discovery
8 which a party has a right to possess. Nothing in this order shall be deemed to
9 restrict the use of documents through a Public Records Act request.

10 *3. Filing Confidential Material*

11 Before filing confidential material or discussing or referencing such material
12 in court filings, the filing party shall confer with the designating party to determine
13 whether the designating party will remove the confidential designation, whether
14 the document can be redacted, or whether a motion to seal or stipulation and
15 proposed order is warranted. The party designating material as confidential shall
16 have the burden of moving to seal. During the meet and confer process, the
17 designating party must identify the basis for sealing the specific confidential
18 information at issue. The Court set forth its procedure for sealing documents in the
19 Jury Trial Scheduling Order. ECF No. 9 at 3. A party who seeks to maintain the
20 confidentiality of its information must follow the Court's procedure.

1 Failure to follow this procedure will result in the documents not being
2 sealed.

3 **E. Designating Protected Material**

4 *1. Exercise of Restraint and Care in Designating Material for Protection*

5 Each party or non-party that designates information or items for protection
6 under this agreement must take care to limit any such designation to specific
7 material that qualifies under the appropriate standards. The designating party must
8 designate for protection only those parts of material, documents, items, or oral or
9 written communications that qualify, so that other portions of the material,
10 documents, items, or communications for which protection is not warranted are not
11 swept unjustifiably within the ambit of this agreement.

12 Mass, indiscriminate, or routinized designations are prohibited.
13 Designations that are shown to be clearly unjustified or that have been made for an
14 improper purpose (e.g., to unnecessarily encumber or delay the case development
15 process or to impose unnecessary expenses and burdens on other parties) expose
16 the designating party to sanctions.

17 If it comes to a designating party's attention that information or items that it
18 designated for protection do not qualify for protection, the designating party must
19 promptly notify all other parties that it is withdrawing the mistaken designation.
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1 Any documents designated as “Confidential” and produced in discovery
2 (formal or informal) prior to the date of this protective order shall be deemed
3 confidential in accordance with this protective order. If any information is initially
4 undesignated and a Party later determines that the information is confidential, it
5 shall notify the other Parties of the new Confidential Information designation. The
6 new designation will be effective upon receipt of such notification.

7 *2. Manner and Timing of Designations*

8 Except as otherwise provided in this agreement (see, e.g., second paragraph
9 of section 5.2(b) below), or as otherwise stipulated or ordered, disclosure or
10 discovery material that qualifies for protection under this agreement must be
11 clearly so designated before or when the material is disclosed or produced.

- 12 a. Information in documentary form: (e.g., paper or electronic
13 documents and deposition exhibits, but excluding transcripts of
14 depositions or other pretrial or trial proceedings), the designating
15 party must affix the word “CONFIDENTIAL” to each page that
16 contains confidential material. If only a portion or portions of the
17 material on a page qualifies for protection, the producing party also
18 must clearly identify the protected portion(s) (e.g., by making
19 appropriate markings in the margins).
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1 b. Testimony given in deposition or in other pretrial proceedings: the
2 parties and any participating non-parties must identify on the
3 record, during the deposition or other pretrial proceeding, all
4 protected testimony, without prejudice to their right to so designate
5 other testimony after reviewing the transcript. Any party or non-
6 party may, within fifteen days after receiving the transcript of the
7 deposition or other pretrial proceeding, designate portions of the
8 transcript, or exhibits thereto, as confidential. If a party or non-
9 party desires to protect confidential information at trial, the issue
10 should be addressed during the pre-trial conference.

11 c. Other tangible items: the producing party must affix in a prominent
12 place on the exterior of the container or containers in which the
13 information or item is stored the word “CONFIDENTIAL.” If
14 only a portion or portions of the information or item warrant
15 protection, the producing party, to the extent practicable, shall
16 identify the protected portion(s).

17 *3. Inadvertent Failures to Designate*

18 If timely corrected, an inadvertent failure to designate qualified information
19 or items does not, standing alone, waive the designating party’s right to secure
20 protection under this agreement for such material. Upon timely correction of a

1 designation, the receiving party must make reasonable efforts to ensure that the
2 material is treated in accordance with the provisions of this agreement.

3 **F. Challenging Confidentiality Designations**

4 *1. Timing of Challenges*

5 Any party or non-party may challenge a designation of confidentiality at any
6 time. Unless a prompt challenge to a designating party's confidentiality
7 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary
8 economic burdens, or a significant disruption or delay of the litigation, a party does
9 not waive its right to challenge a confidentiality designation by electing not to
10 mount a challenge promptly after the original designation is disclosed.

11 *2. Meet and Confer*

12 The parties must make every attempt to resolve any dispute regarding
13 confidential designations without court involvement. Any motion regarding
14 confidential designations or for a protective order must include a certification, in
15 the motion or in a declaration or affidavit, that the movant has engaged in a good
16 faith meet and confer conference with other affected parties in an effort to resolve
17 the dispute without court action. The certification must list the date, manner, and
18 participants to the conference. A good faith effort to confer requires a face-to-face
19 meeting or a telephone conference.

20 *3. Judicial Intervention*

1 If the parties cannot resolve a challenge without court intervention, the
2 designating party may file and serve a motion to retain confidentiality. The burden
3 of persuasion in any such motion shall be on the designating party. Frivolous
4 challenges, and those made for an improper purpose (e.g., to harass or impose
5 unnecessary expenses and burdens on other parties) may expose the challenging
6 party to sanctions. All parties shall continue to maintain the material in question as
7 confidential until the court rules on the challenge.

8 **G. Protected Material Subpoenaed or Ordered Produced in Other**
9 **Litigation**

10 If a party is served with a subpoena or a court order issued in other litigation
11 that compels disclosure of any information or items designated in this action as
12 “CONFIDENTIAL,” that party must:

- 13 a. Promptly notify the designating party in writing and include a copy
14 of the subpoena or court order;
- 15 b. Promptly notify in writing the party who caused the subpoena or
16 order to issue in the other litigation that some or all of the material
17 covered by the subpoena or order is subject to this agreement.
18 Such notification shall include a copy of this agreement; and
- 19 c. Cooperate with respect to all reasonable procedures sought to be
20 pursued by the designating party whose confidential material may
be affected.

1 **H. Unauthorized Disclosure of Protected Material**

2 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
3 confidential material to any person or in any circumstance not authorized under
4 this agreement, the receiving party must immediately (a) notify in writing the
5 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
6 all unauthorized copies of the protected material, (c) inform the person or persons
7 to whom unauthorized disclosures were made of all the terms of this agreement,
8 and (d) request that such person or persons execute the “Acknowledgment and
9 Agreement to Be Bound” that is attached hereto as Exhibit A.

10 **I. Inadvertent Production of Privileged or Otherwise Protected Material**

11 When a producing party gives notice to receiving parties that certain
12 inadvertently produced material is subject to a claim of privilege or other
13 protection, the obligations of the receiving parties are those set forth in Federal
14 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
15 whatever procedure may be established in an e-discovery order or agreement that
16 provides for production without prior privilege review. The parties agree to the
17 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

18 **J. Non-Termination and Return of Documents**

19 Within 60 days after the termination of this action, including all appeals,
20 each receiving party must return all confidential material to the producing party,

1 including all copies, extracts and summaries thereof. Alternatively, the parties
2 may agree upon appropriate methods of destruction. Notwithstanding this
3 provision, counsel are entitled to retain one archival copy of all documents filed
4 with the Court, trial, deposition, and hearing transcripts, correspondence,
5 deposition and trial exhibits, expert reports, attorney work product, and consultant
6 and expert work product, even if such materials contain confidential material. The
7 confidentiality obligations imposed by this agreement shall remain in effect until a
8 designating party agrees otherwise in writing or a court orders otherwise.

9 **K. Federal Rule of Evidence 502(d)**

10 Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
11 proceeding shall not, for the purposes of this proceeding or any other federal or
12 state proceeding, constitute a waiver by the producing party of any privilege
13 applicable to those documents, including the attorney-client privilege, attorney
14 work-product protection, or any other privilege or protection recognized by law.

15 The confidentiality obligations imposed by this agreement shall remain in
16 effect until a designating party agrees otherwise in writing or a court orders
17 otherwise.

18 **IT IS SO ORDERED.** The District Court Executive is directed to file this
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1 order and provide copies to counsel.

2 DATED July 28, 2022.

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4 s/Mary K. Dimke
5 MARY K. DIMKE
6 UNITED STATES DISTRICT JUDGE
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**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND BY
PROTECTIVE ORDER**

The undersigned acknowledges that he/she has read the Protective Order attached hereto, understands the terms thereof, and agrees to be bound by its terms.

The undersigned understands that the terms of the Protective Order obligate him/her to use documents designated CONFIDENTIAL in accordance with the Order, and not to disclose any such documents or information derived directly therefrom to any other person, firm, or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of court.

Printed Name

Date: _____

Signature